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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 349

JAMES L. FORESTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, acting in his own right, sued the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging that employees of the Veterans Administration had wilfully under-appraised the value of homes that had been built by a corporation of which petitioner was a director and officer; and that this caused the corporation's eventual bankruptcy and resulted in petitioner's loss of his salary, loss of his corporate investment in and possible profits from the

building corporation's parent corporation, and his liability for certain of the building corporation's obligations which he underwrote (C.A. App. 1-2, 18-19).[1] The district court dismissed on the grounds (1) that any right which arose from these events belonged to the corporation and could not be pursued by petitioner without either joining the corporation or suing as a member of the class of stockholders,[2] and (2) that in any case the United States was not liable for the occurrences in light of 28 U.S.C. 2680(h)[3] (C.A. App. 11, 24). The court of appeals dismissed petitioner's appeal, holding that he had misconceived his remedy for any right that he might have, and that his appeal was without merit (Pet. App. 1).

The questions involved were decided correctly by the courts below. Any claim which could have been asserted against the United States under the Tort Claims Act because of the allegedly deliberate underappraisal of the homes built by the corporation clearly belonged to the corporation and not to petitioner in

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[1] "C.A. App." references are to the pages of the appendix of petitioner's brief and appendix in the court of appeals, which is a part of the record in this Court.

[2] See Rule 23, F.R. Civ. Proc. The court had dismissed petitioner's previous complaint for his failure to join the corporation or to show compliance with Rule 23, but had given him leave to amend (C.A. App. 3-4).

[3] That section provides in pertinent part as follows:

> The provisions of * * * section 1346(b) * * * shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of * * * misrepresentation, deceit, or interference with contract rights.

his individual capacity. His failure to join the corporation or to proceed under Rule 23 after being given an opportunity to do so was itself a sufficient basis for dismissal of the suit, see Rule 17(a), F.R. Civ. Proc. In addition, the underlying claim is plainly barred by 28 U.S.C. 2680(h), excluding claims arising out of misrepresentation. *United States* v. *Neustadt*, 366 U.S. 696. If the individuals named in the complaint did, in some unauthorized manner, conspire against petitioner personally, then, as the court of appeals held, petitioner misconceived his remedy in suing the United States.

The disposition below is plainly correct and the petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966

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Respondents.

REPLY BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI

This reply brief is necessary to 1.) add footnotes to apply to the petition for writ of certiorari, 2.) show my understanding of the dismissal of the original complaint on December 27, 1963. My understanding is different from the explanation in the memorandum for the United States in opposition, 3.) make a statement on misrepresentation, and 4.) make a statement on interference with contract rights.

I.

Footnotes to apply to petition for writ of certiorari.

	Petition for writ of Certiorari		References
	page	paragraph	
1.	4	1	**C. A. App. 11, 14, 15 Appendix
2.	4	3	C. A. App. 12
3.	6	2	C. A. App. 11
4.	7	numbered 3	***see reporter's transcript of proceedings on 10/2/64 pages 7, 8
5.	7	numbered 4*	

II.

1. Page 2, footnote 2 of the United States memorandum states the following " . . . The court dismissed petitioner's previous complaint for his failure to join the corporation or to show compliance with Rule 23, but had given him leave to amend (C.A. App. 3-4)."

* 10/10/64 should read 10/2/64

** "C.A. App." references are to the pages of the appendix of petitioner's brief and appendix in the court of appeals, which is part of the record in this court.

*** Part of the record in this court.

2. Following is my understanding of why the court dismissed the original complaint on December 27, 1963. The District Judge told me that he read the original complaint to mean that I was bringing the suit for the corporation. I told him that this was not my intention. The Judge gave me leave to amend. The amended complaint was a rewording in an attempt to make it clear that Forester was bringing the suit for Forester.

III.

The elements of misrepresentation and/or deceit are just not in evidence. In particular the element of of reliance is missing. *Prosser on Torts*, 3d.¶103, p. 729.

IV.

The U. S. Attorney brought up in his brief to the Circuit Court of Appeals the possibility of this suit being exempted from the Tort Claims Act if treated as interference with existing contracts or the loss of prospective advantage (C.A. Appellee's brief p. 10). There may be some merit in this Argument (when developed) to knock out part of the claim. However, this was only brought up this once. It has not been argued.

Respectfully submitted,

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Petitioner pro se

CERTIFICATE OF SERVICE

I, James L. Forester, Jr., hereby certify that service of the foregoing reply brief was made upon respondents by delivery of five copies thereof on the 9th day of September, 1966, at the office of the attorneys of record as follows:

Thurgood Marshall, Solicitor General
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